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IN THE

Supreme Court of the United States

OCTOBER TERM, 1938

No. 676

HORTON C. RORICK,

Petitioner,

vs.

DEVON SYNDICATE, LTD., A CANADIAN CORPORATION,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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I. OPINIONS BELOW

The opinion of the District Court (filed June 24, 1936) is at pages 47-50 of the Record.

The opinion of the Circuit Court of Appeals (filed January 11, 1939) is at pages 93-98 of the Record. (Reported 100 Fed. (2nd) 844.)

No petition for rehearing was filed in the court below.

II. STATEMENT OF THE CASE

This is a petition for *certiorari* to review the judgment of the Circuit Court of Appeals for the Sixth Circuit affirming a judgment of the United States District Court, Northern District of Ohio, Western Division, dismissing writs of attachment and garnishment issued on the application of petitioner and dismissing the cause for lack of personal service upon the respondent.

The action was originally brought in the Common Pleas Court of Lucas County, Ohio, against a non-resident foreign corporation, not amenable to personal service, for the recovery of a money judgment, in which the jurisdiction of the court (if any) depended wholly upon property of the defendant being brought within the custody and control of the court through a valid seizure by way of an attachment or garnishment, and substituted service being had by way of publication (R. 2). The statutory ground for attachment and garnishment upon which plaintiff relied in his abortive attempt to thus create jurisdiction in the state court was that defendant was a non-resident foreign corporation and not amenable to service of summons (R. 6). It was not until almost four months after plaintiff's petition was filed that plaintiff actually commenced his action in compliance with Section 11230* by beginning the requisite statutory publication (R. 15 *et seq.*). Section 11230 provides in part that in an action in which service by publication is proper "the action shall be deemed to be commenced at the date of the first publication."

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*To avoid repetition, all references to statutory section numbers throughout this brief, unless otherwise indicated, refer to sections of the Ohio General Code, the pertinent statutory provisions of which as herein discussed are printed in Appendix A to this brief in the order in which they appear in the Ohio General Code.

At the time of filing his petition plaintiff knew that personal service on the defendant was impossible as is established by the fact that *concurrently with the filing of his petition plaintiff filed a purported affidavit in attachment and garnishment on the ground that the defendant was a non-resident foreign corporation* (R. 6) (which affidavit was fatally defective as pointed out *post*); caused an order of attachment to issue, which was returned unsatisfied (R. 9); and caused a notice to be issued for and served upon certain garnishees (the attempted service of which was invalid for failure to leave a copy of the order of attachment with the garnishees as required by Section 11828). *All of these steps were taken some four months prior to the commencement of the action under Section 11230 ante.*

A few days following the filing of the petition, but still several months prior to the statutory commencement of the action as discussed *supra*, plaintiff filed a second affidavit of attachment and garnishment, naming certain additional parties as possible sources of the defendant's property (which affidavit contained the same fatal defects as the first), and in addition (notwithstanding petitioner's statement to the contrary at page 2 of the petition for *certiorari*) *no order of attachment was ever issued or served on this second affidavit* as required by Section 11828. It was not until several months after these premature efforts to institute attachment proceedings that plaintiff took the first step necessary in Ohio to commence an action such as is here involved, under Section 11230 *ante*, viz., began the publication for substituted service, following the completion of which the cause was removed to the United States District Court. Defendant promptly appeared specially and moved for an order quashing the purported substituted service and

dismissing the attachments and garnishments. Both the trial court and the Circuit Court of Appeals below correctly held that all the efforts which plaintiff made in the state court prior to removal and all the steps there taken prior to removal failed to confer jurisdiction upon either the State or Federal Court. Before discussing the reasons for such holding, it should be noted that prior to a decision on defendant's motion the plaintiff, apparently recognizing the soundness of the defendant's position in this respect, undertook after removal to the Federal Court to mend his hold and endeavored to confer jurisdiction on the Federal Court by attempting to revive the void attachment proceeding theretofore had in the State Court, which efforts both the trial court and the court below held were fatally defective and unavailing and amounted to an attempt by the plaintiff to institute a new action in the Federal Court without compliance with the requirements of the law as to service. This phase of the case will be discussed further *post*.

III. ARGUMENT

A.

THE DECISION OF THE CIRCUIT COURT OF APPEALS WAS CORRECT ON THE GROUNDS ADOPTED BY THAT COURT AND IS SQUARELY AND CORRECTLY PREDICATED UPON APPLICABLE STATUTES OF THE STATE OF OHIO AND IN NO WISE CONFLICTS WITH ANY PERTINENT DECISION OF THE SUPREME COURT OF OHIO.

1. The Attempted Attachment and Garnishment Proceedings in the State Court Were Premature and Void, and the State Court Obtained No Jurisdiction of the Cause Prior to Removal to the Federal Court.

It is well established in Ohio that an attachment may *only* be had "at or after" the *commencement* of the action. Section 11819 provides so far as material:

> "In a civil action for the recovery of money, *at or after its commencement*, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated: * * *" (Italics ours.)

As pointed out in the opinion of the Appellate Court below (R. 96), the Supreme Court of Ohio in *Seibert vs. Switzer*, 35 O. S. 661, announced the principle that under the Ohio statutes an attachment issued *prior* to the commencement of the action is *premature and void.*

In that case the Supreme Court of Ohio said:

> "The statute does not authorize an attachment except in an action, and the clerk of the court *has no authority to issue the order of attachment until an action is brought*, and the relation of plaintiff and defendant is established in the case." (P. 665.) (Italics ours.)

While the *facts* of that case differed from those involved in the case at bar, the *principle* enunciated in that decision was correctly applied and followed in the case at bar. In that case, unlike the case at bar, the defendant was apparently a resident and hence jurisdiction was not dependent upon seizure of property and substituted service by publication, and the statutory ground of the attachment was that defendant was an absconding debtor rather than, as here, that defendant was a non-resident foreign corporation upon which personal service could not be obtained, and in which substituted service was therefore required to commence the action. In that case the order of attachment was issued several hours before the petition was filed, although the petition was filed on the same day. It was held that the action *had not been commenced* at the time the order of attachment issued, hence there was no action pending when the order of attachment was issued, and the attachment was therefore premature and void. The court further said:

> "• • • The order of attachment being issued by the clerk of the court *before action brought, was unauthorized and void,* and the subsequent commencement of an action, although on the same day, could not vitalize it so as to give it priority over other valid liens." (P. 665-6.) (Italics ours.)

The principle announced by the Supreme Court of Ohio in the *Seibert vs. Switzer* case was that which was followed and applied in differing circumstances by the court below in the case of *Doherty vs. Cremering, et al.,* 83 Fed. (2d) 388, which was followed by the court below in the case at bar. The opinion in *Doherty vs. Cremering, et al., ante,* was rendered for the court below by Judge Allen, who was for a number of years a member of the Supreme Court of Ohio. Her opinion was con-

curred in by Judges Moorman and Hicks. It held that in an action in which, as in the instant case, personal service was impossible, the action "shall be deemed to be commenced at the date of the first publication," as required by Section 11230.

In *Seibert vs. Switzer, ante,* the Supreme Court of Ohio in an action where jurisdiction depended upon personal service held that no action is commenced until a petition is filed, *and that an order of attachment issued prior to the commencement of an action is premature and void.*

In *Doherty vs. Cremering, ante,* and in the case at bar, the court below held that in an action where service by publication is necessary, no action is commenced until the date of the first publication, and that an order of attachment issued prior to said date is premature and void. While the facts differ, the principle in the two cases is identical.

It was not necessary in *Seibert vs. Switzer* for the Supreme Court of Ohio to consider whether anything more than the filing of the petition was necessary, for there the initial step of filing the petition had not been taken. The court, however, clearly established the principle by that case that *everything* which is necessary to the commencement of an action must be done prior to the issuance of the order of attachment or the order will be void.

Applying the principle of those cases, the Appellate Court below in the case at bar correctly held the purported attachment and garnishment in the State Court in the instant case to have been premature, having been some several months prior to the beginning of the substituted service by publication, and hence was null and void under the applicable Ohio statutes, and that hence

the cause came into the Federal District Court upon removal without any jurisdiction having been vested in the State Court over either the defendant or its property.

2. The Suggestion That the Decision of the Court Below Conflicts With Applicable Ohio Supreme Court Decisions Is Wholly Without Merit.

As we have shown, the decision of the court below, far from being in conflict with *Seibert vs. Switzer, supra,* as contended by the petitioner (brief p. 8), on the contrary, is based squarely upon and exactly follows the principle announced by the Supreme Court of Ohio in that case, *viz.*, that an attachment attempted to be obtained prior to the commencement of an action is null and void. Petitioner in this regard apparently is confused as between the principle decided by that case and the facts involved.

It is, however, claimed by petitioner (brief p. 8) that the holding of the court below is in conflict with the Ohio decision of *Bacher vs. Shawhan,* 41 O. S. 271. It should be pointed out in the first place that this decision is not a decision of the Supreme Court of Ohio, but is a decision of the "Supreme Court Commission of Ohio," which was a temporary commission which held office for two years in pursuance of an Act of the Legislature of Ohio. (Supplement (1884) to Revised Statutes of the State of Ohio, Williams, Vol. 3, page 761.)

With respect to *Bacher vs. Shawhan,* the court below said in its opinion in the case at bar:

> "Under §11819 of the Ohio General Code, in a civil action for the recovery of money, an attachment may be obtained against the property of a non-resident defendant 'at or after' the com-

mencement of the action. We have recently held, *Doherty vs. Cremering et al.*, 83 Fed. (2d) 388, in reliance upon *Seibert vs. Switzer*, 35 O. S. 661; cf. *Henrietta Mining & Milling Co. vs. Gardner*, 173 U. S. 123, that an attachment issuing before personal service is obtained, or before the beginning of the publication for substituted service provided for by G. C. §11292, is premature and void. The case of *Bacher vs. Shawhan*, 41 O. S. 271, was there considered and held not to overrule the *Seibert* case, since it did not construe the statute. We are not persuaded that the present cause, in so far as it involves the timeliness of the attachment in the state court, is to be distinguished from the *Cremering* case, or that that case was wrongly decided." (R. 96.)

Moreover, as will appear from a mere cursory reading of *Bacher vs. Shawhan, ante*, the issue there involved and decided was as to whether the action should have been dismissed for plaintiff's delay or neglect in obtaining service, *i. e.*, for failure to prosecute (which, as the court pointed out, was a matter within its discretion) and not, as here, the quashing of the purported attachment and substituted service upon which the jurisdiction of the court depended.

Also, as is said by Judge Allen in *Doherty vs. Cremering et al., ante*:

"The case of *Bacher vs. Shawhan*, 41 Ohio St. 271, relied upon by the District Court, is not cited in any subsequent decision of the Ohio court of last resort. It does not overrule *Seibert vs. Switzer, supra*, and neither does it consider the statute requiring that an attachment may be obtained 'at or after' the commencement of the action. As the decision does not construe Section 11819, which we consider controlling, and since *Seibert vs. Switzer* specifically interpreted that statute, we think that *Bacher vs. Shawhan* is not in point." (P. 389.)

The only other decision of the Ohio court of last resort with which petitioner claims the holding in the instant case is in conflict is that of *Lessee of Paine vs. Mooreland*, 15 Ohio 435. The decision is not only not in point but obviously could have and has no importance here, since it was decided in 1846, some six years *before* the enactment of the controlling statutes upon which the decision below is premised, *viz.*, Section 11819, *ante* (51 Ohio Laws 86, enacted in 1852) and Section 11230, *ante* (51 Ohio Laws 60, enacted in 1852).

Of the remaining four cases cited as decisions with which the holding in the instant case is claimed to be in conflict, *none are decisions of the court of last resort in Ohio, viz.*, the Supreme Court; *all are decisions of Ohio courts of inferior jurisdiction.* Two of the four (*Central Savings Bank vs. Langenbach et al.*, 1 O. N. P. 124, and *Royal Indemnity Co. vs. Agrios*, 7 Ohio Opinions 272) are decisions of Courts of Common Pleas, *i. e.*, county trial courts, and the remaining two (*St. John vs. Parsons*, 54 O. A. 420, and *Citizens National Bank vs. Insurance Co.*, 12 O. C. C. (N.S.) 401) are decisions of intermediate appellate courts. Neither the *Langenbach* nor *Parsons* cases make any mention of or give any consideration to the controlling effect of either Sections 11819 or 11230, *ante*, the *Union Central Insurance Co.* case considers only Section 11819, and makes no reference to the equally important Section 11230, and the *Agrios* case (one of the Common Pleas decisions) is the only one in which the two statutes are considered, and the trial judge rendering that decision makes this revealing comment at page 272 of the opinion:

> "So far as counsel and the court have been able to ascertain a direct decision on this question (*i. e.*, related effect of Sections 11230 and 11819) has never been reported." (Matter in parentheses ours.)

This observation in the face of the decision of *Doherty vs. Cremering et al.*, 83 Fed. (2d) 388 (C. C. A. 6) *ante*, theretofore decided, as well as the decision of an Ohio court of equal jurisdiction, *Bear vs. Old Tyme Distilleries, Inc.*, 5 Ohio Opinions 530, in which a conclusion was reached precisely the reverse of that reached in *Royal Indemnity Co. vs. Agrios, ante.* If any consideration whatever is to be given to decisions of Ohio courts of jurisdiction inferior to the court of last resort, it should be noted that *Bear vs. Old Tyme Distilleries, Inc., ante*, squarely supports the decision in the instant case and in *Doherty vs. Cremering et al., ante.*

3. The Attempted Attachment and Garnishment Proceedings in the State Court Were Likewise Invalid on the Issue Determined and the Ground Assigned By the Trail Court Below and on Which the Appellate Court Below Found It Unnecessary to Pass.

The trial court found upon the evidence adduced in support of the defendant's motion to quash and dismiss that the affidavits upon which the attempted attachment and garnishment proceedings in the state court rested were fatally defective and contrary to Section 11532 (which requires that the acknowledging officer must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding) in that the notary before whom both affidavits were sworn, occupied such a relationship to the plaintiff as that he was disqualified under the statute (R. 49). The conclusion of the court in this regard was:

> "I do not think the courts should pronounce their benediction upon a practice which would permit one circumstanced as was Mr. Drennan to preside at the taking of depositions." (R. 49.)

The appellate court below found it unnecessary to pass on this issue, and yet if correctly decided by the trial court, as we believe it was for reasons to be briefly discussed presently, the decision below of which petitioner complains is valid and correct without regard to the reasons urged in the petition for allowance of the writ, and if allowed this court would examine this and the other additional grounds urged in the court below in support of the judgment (*United States vs. American Railway Express Co.*, 265 U. S. 425, 435). This would necessarily involve a review of the evidence and a finding as to specific facts. We do not understand that this court ordinarily grants *certiorari* for that purpose. (*General Pictures Co. vs. Electric Co.*, 304 U. S. 175, 178; *Southern Power Co. vs. Public Service Co.*, 263 U. S. 508; *U. S. vs. Johnston*, 268 U. S. 220, 227.)

The relationship between plaintiff and the notary at the time of the filing of the affidavits in attachment as shown by the record was as follows:

Plaintiff was a prominent partner in and president of the partnership bearing his name (Spitzer-Rorick & Company), through which partnership he was engaged in the municipal bond business as a broker (R. 62, 67). Plaintiff was also president of The Spitzer Rorick Trust & Savings Bank (the garnishee in whose hands the funds of defendant were attempted to be attached) and through which he engaged in the banking business at Toledo, Ohio (R. 5, 31.) The notary Drennan was and has been a lawyer employed by plaintiff's partnership continuously since his admission to the bar in January, 1916 (R. 61). In such capacity he did work for the partnership, for the plaintiff's bank, and on at least one occasion handled some personal matters for one of plaintiff's sons (R. 64). Drennan notarized, in addition to plain-

tiff's two affidavits in attachment and garnishment (R. 7, 13), plaintiff's affidavit for substituted service (R. 15), the answer of plaintiff's bank as garnishee (R. 26), the answer of plaintiff and associated voting trustees as garnishees, and the answer of another garnishee (omitted from printed record).

Not only was this notary a lawyer for the plaintiff and his partners and banking interests, but he was employed as such as his principal business and means of livelihood by plaintiff's partnership (R. 64). This intimate personal relationship between plaintiff and the notary whose "livelihood depended in a large measure upon the goodwill" of plaintiff surely was at least as close and direct as that of a relative, who, like an attorney or other interested person, is expressly forbidden to act as notary (Ohio General Code Section 11532, *ante*). This disqualification should not be confused with that provided by statutes of other states or where the disqualification is alleged to arise solely by reason of an asserted financial interest in a particular case.

Leavitt vs. Rosenberg, 83 O. S. 230.
Wuerth vs. Wuerth, 250 N. W. 520 (Mich.).
Duke of Northumberland vs. Todd, 7 Ch. Div. Law Reports 777.
Ross vs. Shearman, 2 Cooper's Reports, Temp. Cott. 172.

The relationship of the notary here was not only that of an attorney, but was so close and intimate and so widespread in plaintiff's affairs as to make the notary personally interested in all of plaintiff's transactions such as the one here involved, and as the trial court properly said, disqualified him under the statute "from presiding impartially at the taking of depositions." In

passing over this point without deciding it, the Circuit Court of Appeals erroneously stated that the pertinent statute had since been amended. There has been no amendment as to the attachment and garnishment statute so as to permit the taking of such an affidavit by an attorney for one of the parties.

In addition, the notary was further disqualified under Ohio General Code Section 121, as an employee of plaintiff, who was a banker and a broker.

4. Under the Decisions of the Supreme Court of Ohio the Void Attachment and Garnishment Proceedings in the State Court Were Not and Could Not Be Revived Nor Was Jurisdiction Conferred Upon the Federal Court by the Additional Proceedings Had in the Federal Court Some Five Years Later.

It is submitted that it is entirely clear for the reasons stated by the Circuit Court of Appeals as well as for the reasons assigned by the trial court, that the attempted attachment and garnishment proceedings in the state court were a legal nullity, wholly failed to confer any jurisdiction upon the state court, and that consequently the cause was removed to the federal court without any jurisdiction having theretofore attached either over the defendant or any of its property.

Shortly following the removal of the cause to the trial court below, defendant appeared specially and moved to quash the pretended service and dismiss the pretended attachment and garnishment proceedings (R. 26). More than five years thereafter plaintiff filed what was styled "Supplemental and Amended Petition" (R. 29), which was identical with the original petition "in all respects material to this appeal" (Petition for *Certiorari*, p. 2).

This new petition contained a praecipe (R. 32) directing the clerk of the federal court to issue summons for the defendant, which was addressed to the United States District Marshal and directed him to notify the defendants *"that they have been sued * * * in the District Court of the United States* within and for the Western Division of the Northern District of Ohio" (R. 86). The praecipe also directed the clerk to issue an order of attachment and garnishment addressed to the United States District Marshal to be served upon the *identical garnishees* theretofore attempted to be served in the state court. The summons was returned "not found" (R. 86). Plaintiff also filed what was styled "Supplemental affidavit in garnishment" (R. 33) naming the identical garnishees theretofore named in the previous affidavits, describing the identical property which petitioner now claims was reached by the attachment theretofore attempted in the state court and one additional item of property, but this affidavit was sworn to before a different notary. Some time later plaintiff filed an affidavit for substituted service by publication (R. 85), thus again rendering the attempted attachment premature and void under the Ohio statutes and decisions *ante*. In other words, plaintiff performed all of the acts that he was required to perform to commence a new suit in the federal court except obtain service of summons upon the defendant, and even this plaintiff attempted unsuccessfully.

It is entirely clear that the proceedings in federal court were not intended to be and were not in fact either amendments of the proceedings followed in state court some five years before, nor as petitioner now appears to claim (brief 19), merely an attempt to reach an additional item of property, but in fact and effect were nothing more nor less than an abortive attempt to commence

a new suit in the federal court and to sue out a complete new attachment against a non-resident of the district without obtaining personal service, and both courts below so hold (R. 49 *et seq.*, 96 *et seq.*).

But *a arguendo*, even if plaintiff by his efforts intended an amendment to the state court proceedings, it is entirely clear under the law of Ohio that those proceedings being based upon defective affidavits and being premature (Sections 11230 and 11819) were a legal nullity and could not be amended so as to vivify the void writ.

In *Leavitt vs. Rosenberg*, 83 O. S. 230, it is said in Syllabus 4:

> "The levy of an order of attachment, based upon an insufficient affidavit, cannot be upheld by an amendment of the affidavit."
>
> See also page 240 *et seq.* of the opinion.

The *Leavitt* case, relied upon by the trial court (R. 49), simply follows the long settled and well established law in Ohio. See *Pope vs. Hibernia Insurance Company*, 24 O. S. 481, Syllabi 1 and 2, and *Endel vs. Leibrock*, 33 O. S. 254. In Syllabi 1 and 2 of this latter case the Supreme Court of Ohio says:

> "A writ of attachment under the code, without the requisite affidavit, is void." (Syl. 1.)
>
> "The seizure of property of a non-resident debtor, upon whom service of summons can not be made on such void writ, does not give the court such jurisdiction over the defendant or his property as will authorize a service by publication, or a judgment in the action." (Syl. 2.)

In *Seibert vs. Switzer*, 35 O. S. 661, *ante*, at page 665 *et seq.*, the court says with reference to a premature attachment:

> "The order of attachment being issued by the clerk of the court before action brought, was unauthorized and void, and the subsequent commencement of an action, although on the same day, could not vitalize it so as to give it priority over other valid liens."

In view of these controlling decisions of the Supreme Court of Ohio, *supra*, it seems hardly necessary to point out that the cases set forth at pages 17 and 18 of petitioner's brief, all of which are from jurisdictions other than Ohio, in support of the claim of petitioner that a defective affidavit may be amended, should be regarded as neither persuasive nor controlling.

Under the Ohio decisions, *supra*, had the action remained in the State Court the defects in the proceedings could not have been cured by amendments. Petitioner's claim to the contrary ignores the indisputable premise that in the instant case, prior to removal, the jurisdiction of the state court to hear and determine the cause, and after removal, the like jurisdiction of the Federal Court, depended entirely upon jurisdiction having been obtained over the defendant's property, which in turn depended exclusively upon the validity of the attachment proceedings, and that those proceedings being null and void, were non-amendable.

Nor was there an action pending, for the attempted substituted service by publication in the State Court was invalid, since there was no notice of the seizure of any property and no property was lawfully seized upon which the notice might operate (*Pennoyer vs. Neff*, 95 U. S. 714, *Crary vs. Dye*, 208 U. S. 515). Moreover, the notice was fatally defective (Section 11,295; *Balsmeyer vs. Lansdale, et al.*, 27 O. A. 125) for failure to notify the defendant that the action was one in which it was sought by provisional remedy to take or appropriate certain

property of the defendant (R. 16) which was the statutory ground set forth in the affidavit for constructive service (R. 15). All that remained, therefore, was a petition lodged with the clerk and all the steps necessary to commence the action had to be taken. (See *Cleveland and Western Coal Co. vs. J. H. Hillman and Sons Co.*, 245 Fed. 200 (Ohio)).

A fortiori, we believe it is equally clear that petitioner's claim that the steps taken in Federal Court after removal vivified the void state proceedings, is wholly untenable. Petitioner relies upon 28 U. S. C. A. Section 777, the pertinent provisions of which are as follows:

> "No summons * * * return, process * * * or other proceedings in civil causes, *in any court of the United States,* shall be abated, arrested, quashed or reversed *for any defect or want of form.* * * *" (Italics ours.)

It will be noted that this section specifically refers to "summons * * * return, process * * * or other proceedings in civil causes, *in any court of the United States,* * * *" (italics supplied), whereas all the proceedings we claim to be non-amendable were had in the Common Pleas Court of Lucas County, Ohio. Moreover, the section refers only to a "defect or want of form," whereas under the decisions of the Supreme Court of Ohio, *supra*, both a valid affidavit and a writ "at or after" the commencement of an action are jurisdictional requisites to proceedings in attachment, hence a defect therein is a jurisdictional defect and not merely one "of form."

Likewise, the Federal Court cases cited in support of the asserted amendability deal with actions *originally commenced* in the District Courts of the United States, wherein *personal service* had been made upon the defend-

ants, as the attachment there is by virtue of the laws of the United States, and is merely incidental to the action. In the case at bar the attachment is the essential prerequisite upon which the jurisdiction of the court depends. See *Pennoyer vs. Neff*, (1877) 95 U. S. 714, 728.

Plaintiff's claim that notwithstanding the decisions of the Supreme Court of Ohio precluding the amendment of the attachment proceedings, nevertheless such amendment is permitted under the federal law, involves the specious premise that under the federal law life may thus be breathed into attachment proceedings which under the state law were admittedly void and of no effect, a legal nullity, and jurisdiction thus conferred upon the federal court in a manner neither permitted by the state law in actions there commenced nor by the federal law in actions there commenced.

The steps taken in federal courts were therefore ineffective as an amendment to the proceedings theretofore had in the state court.

B.

THE SUGGESTION THAT THE APPELLATE COURT BELOW MISCONSTRUED SECTIONS 79 AND 726 OF TITLE 28 U. S. C. A. IS UNTENABLE.

The steps taken in federal court were equally invalid as *de novo* attachment proceedings in the absence of personal service. *Big Vein Coal Co. vs. Reed*, 229 U. S. 31; *Laborde vs. Ubarri*, 214 U. S. 173; *Ex parte Railway Co.*, 103 U. S. 794; *Chaffe vs. Hayward, et al.*, 20 Howard 208, 215; *Toland vs. Sprague*, 12 Peters 300; *Cleveland and Western Coal Co. vs. J. H. Hillman and Sons Co.*, 245 Fed. 200 (construing the Ohio statutes here involved). Similarly see *Sandusky Cement Co. vs. Hamilton & Co.*,

273 Fed. 596 (Ohio); *28 U. S. C. A.*, Sections 81, 79 and 83.

Petitioner argues that the rule by this court announced in the *Big Vein Coal Co.* and like cases should not apply to a case commenced in state court even when no valid attachment was there secured and no jurisdiction over the defendant there obtained prior to removal. No decisions are cited for the claimed distinction and the argument is cogently answered in the opinion of the Court of Appeals below (R. 96 *et seq.*). See the decision of Circuit Judge, later Mr. Justice Van Devanter in *Hatcher vs. Supply Co.*, 133 Fed. 267 (C. C. A. 8). The decision of the late Judge Westenhaver in the *Hillman and Sons* case, *supra*, is flatly to the contrary of petitioner's contention. Also see *Pratt vs. Denver, etc., R. R. Co.*, 284 Fed. 1007.

Petitioner apparently relies on Sections 79 and 726 of Title 28 U. S. C. A. in support of this claim, but Section 79 manifestly purports to hold upon removal *only* such property of the defendant as has theretofore been *validly* attached in the state court and Section 726 merely provides that in common law causes in the district courts the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant which are provided by the laws of the state. The section makes no distinction as between actions originally commenced in federal courts and those removed to such courts; its terms manifestly apply to all "common law causes" in the federal court without regard to origin. Moreover, petitioner's contention overlooks the fact that this purported attachment in federal court, like those previously attempted in the state court, was premature and hence void under the law of Ohio, the writ having been issued prior to the beginning of publica-

tion for substituted service and hence prior to the commencement of the action.

Had the cause remained in state court the plaintiff would have been required to have recommenced the action. (See *ante*.) The cause came into the federal court without any jurisdiction of any kind having attached either to the defendant or defendant's property. It is well established that the federal court takes the case precisely in the condition it was when the order of removal was made, with full power to dispose of all phases of the controversy.

Ex parte Fisk, 113 U. S. 713, 725.
Remington vs. Central Pacific Railroad Co., 198 U. S. 95.
Lebensberger vs. Scofield, et al., 139 Fed. 380.
Hatcher vs. Supply Co., 133 Fed. 267.
Dicks-David Co. vs. Maurer Co., 279 Fed. 281.
Adams vs. Heckscher, 80 Fed. 742.
Bull vs. Chicago, etc., Ry. Co., 6 Fed. (2d) 329.

In such circumstances jurisdiction must be obtained and the cause proceeds as if originally commenced in the federal court (28 U. S. C. A. Sections 72, 79, 81 and 83).

C.

THE SUGGESTION THAT THE DECISION OF THE COURT BELOW CONFLICTS WITH CLARK V. WELLS, 203 U. S. 164, IS WHOLLY WITHOUT MERIT.

Petitioner's claim in this regard overlooks the fact that in *Clark vs. Welles, ante*, there had been a valid

seizure under the laws of Montana of property of the defendant prior to removal, whereas in the instant case there was neither a valid seizure of property under the laws of Ohio nor jurisdiction over the defendant obtained prior to the removal. Therein lies the distinction between the case at bar and the cases cited at pages 20-22 of petitioner's brief.

CONCLUSION

There are no such compelling circumstances here as this court has uniformly held requisite to the granting of *certiorari*. No questions of wide or public importance are presented. All that is involved is an attachment proceeding under the Ohio law to which the court below applied the statutes and law of Ohio as interpreted by the highest court of that state. There is no question of an attempt to apply the general as distinguished from the local law, nor is there a conflict between the decision below and the decisions either of this court or the highest court of the state of Ohio. We do not understand that *certiorari* is granted merely to give the defeated party another hearing, particularly where, as here, no petition for rehearing was filed below (*Magnum vs. Coty*, 262 U. S. 159, 163).

Respectfully submitted,

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APPENDIX

A

Sections of the General Code of Ohio Involved, Cited or Discussed.

Section 121:

"No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

Section 11230:

"An action shall be deemed to be commenced within the meaning of this chapter, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made."

Section 11292:

"Service may be made by publication in any of the following cases:

* * * * *

"7. In an action in which it is sought by a provisional remedy to take or to appropriate in any way property of the defendant, when the defendant is not a resident of this state or is a foreign corporation or his place of residence can not be ascertained;

* * * * *"

Section 11295:

"The publication must be made for six consecutive weeks, in a newspaper printed in the county

where the petition is filed. When made in a daily newspaper, one insertion a week shall be sufficient. It must contain a summary statement of the object and prayer of the petition, mention the court wherein it is filed, and notify the person or persons thus to be served when they are required to answer."

Section 11532:

"The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding."

Section 11819:

"In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

"1. Excepting foreign corporations which, by compliance with the law therefore, are exempted from attachment as such, that the defendant or one of several defendants is a foreign corporation;

"2. Is not a resident of this state;

* * * * *"

Section 11828:

"When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served."

B

United States Statutes Involved, Cited or Discussed

Section 72, 28 U. S. C. A.:

"Whenever any party entitled to remove any suit mentioned in section 71 of this title, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a state court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court."

Section 79, 28 U. S. C. A.:

"When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed."

Section 81, 28 U. S. C. A.:

"The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal."

Section 83, 28 U. S. C. A.:

"In all cases removed from any State court to any United States court for trial in which any one or more of the defendants has not been served with process or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in

such United States court. Nothing in this section shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal."

Section 726, 28 U. S. C. A.:

"In common-law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the State in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such State laws as may be in force in the States where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such State laws, shall be first furnished by the party seeking such attachment or other remedy."

Section 777, 28 U. S. C. A.:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall in its discretion and by its rules, prescribe."